Digital Openings in German Legal Academia

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Almost 20 years after the adoption of the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (2003), open access publications still play a comparatively marginal role in the legal academia. Yet legal scholarship is already benefiting from a public discourse that quality-assured legal scholarship blogs have initiated with their science-communicative opening. Admittedly, particularly the lack of sustainable funding models reinforces the disciplinary reluctance to embrace open access and open science in legal academia. Today, however, the vehemence of digitalization processes, boosted by the pandemic, drives legal academia in Germany into a fairly uncomfortable situation, not to speak of future existential challenges in a post-pandemic digital world. Traditional publication avenues and their gatekeepers feel the pressure of digital transformation on an everyday basis, nevertheless they are far from blown off from their cartel-like positions, at least until today. One cannot foresee the impact of the digital landslides in the publication culture in legal academia within the next couple of years, let alone decades. What is possible today, is to work around the questions: What or who is German legal academia and who are its gatekeepers? Unfolding the structure of German legal academia will enable us to gain insights into the remarkable resistance to open access (Hamann 2019) and the successful shifts towards open access, or even open science.

Eight claims about German legal academia

According to a recent survey, only 11% of online legal journals meet the open access definition criteria of the scientific organizations (cf. Berlin Declaration 2003; Hamann/Hürlimann, Rechtswissenschaften 2019, S. 111). New formats such as blogs (Verfassungsblog, Völkerrechtsblog, JuWiss, etc.) and online journals (e.g., German Law Journal, Recht und Zugang, Zeitschrift für internationale Strafrechtswissenschaft, HRRS-Online Zeitschrift für Höchstrichterliche Rechtsprechung und Ordnung der Wissenschaft) that publish open access are rare exceptions. Nevertheless, textbooks and case materials are published almost exclusively in traditional print format, although individual textbooks have been supplemented by enclosed CD-ROMs for some years now.

Hanjo Hamann and his colleague Daniel Hürlimann discuss the following claims that would justify the prevailing reluctance towards open access in legal academia: 1) only lawyers are interested in legal academia, 2) only Germans are interested in German law, 3) legal careers don’t rely on metrics, 4) Lawyers don’t have peer review, 5) third party funding does not play a role in legal academia, 6) legal academia is paper-based and IT poor, 7) publishers need to set prices in line with market conditions, and 8) law publishers have reasonable prices (which is

why there would not be incentives for alternative and free open access avenues). The authors conclude that these eight claims about publishing practices in legal academia certainly have a particular core truth, nevertheless, remain disputable simply because the changes and digital waves in the field smoothly invalidate the claims.

Law students and junior scholars lead the way

Junior scholars seem to lead the open access movement in German legal academia. For example, Nikolas Eisentraut recently edited and published the first open access case studies book for students. For this pioneering book project Eisentraut was able to get the established publisher De Gruyter on board. The book processing charge (BPC) was funded by the Free University of Berlin's Open Access program. Noteworthy is also his transparent approach towards "open science": every single step in the making of this book including the funding is documented online (here). Another example that might support the claim that junior scholars are pioneering open access is the initiative "OpenRewi", a collective of law students, doctoral students and postdocs founded in 2020. OpenRewi is working with wikibooks with the decent purpose to advance open legal scholarship. More specifically, OpenRewi creates open access teaching materials according to the Open Definition. The collective is committed to creating content of high quality that is dynamic as well, i.e. responsive to *a posteriori* improvements. The authors work decentralised, autonomous and cooperatively on individual book projects in different legal fields.

All this, of course, does not mean that senior scholars have been impervious to open access so far. On the contrary, awareness for open access, particularly because of its increasing importance and salient advantages, is becoming stronger and stronger in legal academia. This is particularly relevant because law professors are still – not the only but the most powerful – gatekeepers in legal academia. In their gatekeeping function law professors also administer, channel, and foreclose academic careers. If this is not publish or perish at work without metrics, then what is it? What does this, after all, tell us about (invisible) power relations and standard procedure in legal academia?

Research Project: Open Access in Legal Academia

This very question drives the research project "Open Access in Legal Academia – Structural Changes towards a participatory quality based publication culture" (OPERE). The research project is funded by the Berlin University Alliance and closely connected to the Verfassungsblog project "Offener Zugang zu Öffentlichem Recht" (OZOR). The aim of this socio-legal project is to look deeper into what and who legal academia is and does. The starting point is the assumption that the current architecture of the publication landscape in German legal studies is an expression of conventions, norms and ideas of a tradition-conscious disciplinary culture. This discipline-specific set of rules has in turn an impact on the publication culture, including the gatekeepers. Therefore, the key questions of this research project are: Which disciplinary conventions and norms

are prevalent in legal academia in general, and especially regarding knowledge production and dissemination? Are there intra- and interdisciplinary practices, initiatives, and ideas to promote digitalization, open access, and, in a next step, open science? Is there an already observable impact of established science blogs on teaching and research, e.g. the quality of publications?

One way of dealing with these questions could be the concept of legal academia as an “semi-autonomous social fields” by Sally Falk Moore (1973). Moore regards society as a dynamic interplay of different social fields (family, religion, associations, etc.). Each of them autonomously generates its own rules, norms, and symbols, while, conversely, rules and norms outside the field exert influence on them. Typical for a semi-autonomous social field is the creation of compliance with the rules and the possibility of sanctioning. In this sense, legal academia – as well as other disciplines in humanities – generates its own set of rules and ideas, while at the same time cross-disciplinary scholarly convention and norms outside this customary world wield influence on the field-specific set of rules and ideas.

This understanding of “field” is quite close to Bourdieu’s concept of field. Bourdieu understands a field as a network of relations between social positions determined by distribution of economic, social and cultural capital. Accordingly, for Bourdieu, “law” and “the sciences” are distinct fields in which social power, cultural capital, competencies, goods, interests, and benefits are contested and negotiated through habitual practices. On that basis, one could pose the question as to which habitual practices (e.g. attitudes and values) are found in legal academia and by which actors, and how they sustainably structure the culture of publication and, in a broader sense, the culture of scholarly communication. In addition, it would also become necessary to examine how certain actors (more likely from the new generation) with well-equipped “digital capital” (Ignatow/Robinson 2017) are fundamentally challenging the previous traditional field composition of legal studies, including the publication culture, and are already beginning to reorder it. The student case book of Eisentraut and the OpenRewi initiative are paramount examples for these gradual shifts.

Lack of socio-legal research

So far no empirical study on the publication culture in legal academia has been conducted (cf. Ball, 2021). Only a few studies in the sociology of law have focused primarily on the modes of action of law as a social phenomenon and on its institutional dimension. Also, some studies on the legal system can be found. They are mainly dedicated to organizational sociological, judicial, and bureaucratic aspects (see Baer 2021). To date, only little fundamental research on legal academia in terms of legal history (e.g., Stolleis’ seminal work on the history of public law in 4 volumes) and self-reflexive observations (Jestaedt 2014, Dreier (ed.) 2018, Eisentraut 2019) exists, which are more often anecdotal or exemplary than strongly empirical. In both cases, law is described as a particularly tradition-bound discipline in terms of its disciplinary self-esteem, organizational structure, faculty member decisions, and publication strategies. The study by the German Council of Science and Humanities on the „Perspectives of Legal Science

in Germany“ (Wissenschaftsrat, 2012) concludes that an interdisciplinary and international opening as well as a strengthening of the basic subjects is necessary for legal scholarship if it wants to survive the new competitive conditions of the strongly interdisciplinary scientific landscape. This would require a cross-border scientific discourse in which electronic publications with greater accessibility would be advantageous (p. 66 f.).

Publishing agents in legal academia

When talking about legal academia, the first and obvious problem is to define the boundaries of legal academia. Narrowing our gaze solely to law professors at law faculties would be a too limited view on legal academia in Germany. They are the most powerful players in the field indeed, but far from being the only ones responsible for producing knowledge. A differentiation between law professors is also necessary since law professors that are not faculty members at one of the approximately 40 to 45 law faculties in Germany but rather teaching law at one of the approximately 250 so called “universities of applied sciences” are usually not accounted for. In some fields, such as police, juvenile, and poverty law, their research and publications are indispensable. But also within the conventional law faculties the so-called *Mittelbau* (doctoral and postdoctoral staff) is not only keeping the faculties teaching business running but also eagerly producing legal knowledge, be it for their own qualifications (PhD, third party fund research project, or habilitation). Their contribution is indispensable too. Apart from the academia, there are a bunch of legal practitioners who write seminal articles and/or comments on recent judgments. In the list of this multilayered landscape of publishing agents, who themselves are on the boards of the law journals, it is all but easy to clearly identify gatekeepers.

Yet for legal academics it should not be too hard to observe a new legal startup in the field that will certainly play an increasing role: the newly founded Max Planck Law. The latter – one has to admit – fulfills all the conditions of a genuinely interdisciplinary, digital, and transnational environment for a future sustainable legal scholarship. As a matter of fact, open access is the new standard at Max Planck law departments. Yet, this is not surprising since the Max Planck Society among others is a signatory party to the declaration 2003.

Open Access and Diversity

If legal academia is neither the hotspot for open access nor the most diverse discipline (at least) in Germany (see Grünberger/Mangold/Markard/Payandeh/Towfigh 2021), then perhaps it might be useful to examine a possible correlation between both the lack of open access and the lack of diversity in legal academia. It is still an open question, whether a class, gender and/or race disparity in open access publishing can be observed – and if yes, what does this tell us about class, gender and race relations in a digital legal academia? Such questions become particularly relevant when, even in this early stage, there are accounts of creeping processes of commodification of open access by the big publishers: Open access as

a new personal asset in CVs? Certainly, open access has been celebrated as a way of democratizing science and scholarship, and rightly so. But we should be careful not to be disillusioned to observe today or in future that the usual gate keepers of legal academia are still in charge.

Open access and internationalization

Another particularly interesting question is whether the momentum of open access will have enough power to tear down the protectionist wall of German legal academia (cf. Wissenschaftsrat 2012, S.7; von Bogdandy). Verfassungsblog, Völkerrechtsblog, and the German Law Journal have already begun with gauging holes in this thick wall of reinforced concrete (made in Germany). But also prior to these digital realms foreign lawyers were interested in German law, the vivid debates on the applicability of European law in the German legal order is a testimony to this. This debate that has been going on for decades is marked by a transnational discourse not only among the ECJ and the German Constitutional Court but also among European lawyers and other constitutional courts of the EU member states. Just recently, Armin von Bogdandy raised the question whether one ought to speak of "German legal hegemony" pointing to the processes of "Germanizing European law" or maybe (just) "Europeanization of German Law". The fact that the German constitutional court recently began translating its major decisions into English, French and other European languages should not only be read as promoting curiosity and interest towards German law or as an introductory course to "German constitutional law" but as practicing "open law" beyond open access. In advancing these openings German law will not only be accessible to non-German lawyers but will also open discursive spaces where German lawyers will have to defend their jurisprudence and jurisdiction against foreign lawyers and their doctrinal perspectives. This, in turn, could have an impact on and maybe infringe the authority of German lawyers over their jurisprudence and their jurisdiction. In both ways, this indicates the productive and synergetic potentials of open access and open law.
